No. 3293.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
GEORGE H. KING,
Individual Doing Business as George H. King Rubber Company, and Also as George H. King Tire Company,
Bankrupt,

Wm. H. Moore, Jr., Trustee in Bankruptcy,
Appellant,
vs.
D. B. Barnes,
Appellee.

Wm. H. Moore, Jr., Trustee in Bankruptcy,
Appellant,
vs.
Empire Tire & Rubber Company, a Corporation,
Appellee.

REPLY BRIEF OF APPELLEE BARNES.

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REPLY BRIEF OF APPELLEE BARNES.

STATEMENT.

We do not feel that appellant has presented such a statement of facts as will enable this Honorable Court

to clearly comprehend the true relation of the parties and, therefore, at the expense of some repetition, which, unfortunately cannot be avoided, we will state as best we can and as clearly, concisely and chronologically as nearly as possible the facts as shown by the record.

Appellee, D. B. Barnes, on February 23, 1918, filed in the District Court of the United States for the Southern District of California, in the matter of George H. King, bankrupt, then pending on reference before the Honorable Force Parker, referee, his petition to reclaim from William H. Moore, Jr., receiver in bankruptcy of said King, certain automobile tires (hereinafter referred to as "tires"). Said petition alleges that said Barnes, on September 14, 1917, was, and for a long time prior thereto, and ever since had been, and then was, the unqualified owner and entitled to the possession of said tires; that long prior thereto he had consigned them to said King for sale; that on September 14, 1917, said Moore was and ever since had been, the duly appointed, qualified and acting receiver in bankruptcy of said King, and as such on said day took possession of said tires, and ever since had held the same as the property of said bankrupt's estate and refused to deliver them to petitioner, although demanded to do so. [Tr. pp. 2 to 8, inclusive.] On March 13, 1918, said receiver filed his answer to said petition setting up two defenses:

In his first defense he admits his receivership, his possession of said tires and his refusal to deliver them.

He denies all other allegations of the petition. [Tr. pp. 11, 12.]

In his second defense, he alleges that some person unknown to him sold and delivered said tires to said King to be, and that they were, placed in the stock in trade of said King at his place of business where he conducts a retail store selling tires, etc.; that there were no cards in said place of business or on said tires indicating any ownership in any person whomsoever, and that said stock, including said tires, were being sold to the retail trade in the regular course of business of said King; that the sale of said tires to said King did not fix, nor reserve the right to fix, prices at which they were to be sold nor to require said King to account for the proceeds of sales to anybody or to make reports of any goods on hand at any time and that said King was permitted to and did mingle said goods with his other stock and sold them in the regular course of business. [Tr. pp. 13, 14.]

The articles of office furniture mentioned in said petition are not involved in this appeal. [Tr. p. 34, bottom.]

After a partial hearing on the issues thus raised, said Moore, as trustee of said estate, having been substituted for himself as receiver, on April 25, 1918, filed a so-called third defense wherein it is alleged that said Barnes and King, up to November 27, 1916, were co-partners, doing business as George H. King Rubber Company (hereinafter referred to as the King Company), and as such purchased tires from the Marathon Tire & Rubber Company (hereinafter re-

ferred to as the Marathon Company) and became indebted to it for the goods so purchased and was at the time of dissolution of said partnership, November 27, 1916, indebted to it in the sum of $1031.47, which was still unpaid; that the goods sought to be reclaimed by Barnes were part of the assets of the partnership on its dissolution; were part of the goods sold and delivered by it to said partnership and for which the claim of the said Marathon Company is made and constitutes available assets from which said $1031.47 was and is payable. [Tr. pp. 26 to 30.]

To this so-called third defense Barnes filed objections. [Tr. pp. 16-26.] No formal ruling overruling such objections was made, but said defense was filed and testimony received relating to the matters therein alleged.

After full hearing had the referee ordered the trustee to deliver said tires to Barnes. [Tr. p. 45.] And thereafter said trustee filed his petition for review of said order [Tr. p. 45], and later filed an amended petition for such review. [Tr. pp. 47-49.] The District Court approved the order of the referee [Tr. p. 51] and from which order this appeal is prosecuted. [Tr. pp. 115-117, 122-126.]

What the Testimony Shows.

That appellee Barnes and said King were associated in a business way from August or September, 1914, to November 13, 1916, under an oral agreement whereby it was agreed that Barnes should furnish the money and credit necessary to conduct the business

of repairing and selling automobile tires; that such business should be his until the profits should reimburse him for all the money he had put into it, and when so reimbursed he would give King an undivided half interest in it and that King was to contribute his service without compensation. [Tr. p. 53.] Barnes was never reimbursed. On September 11, 1916, there was due him $5682.49, and at the time of the hearing before the referee said sum had not been repaid to him. [Tr. pp. 54, 74.] Barnes and King conducted their business under the name of the George H. King Rubber Company. [Tr. pp. 24, 35, 55.] On November 13, 1916, Barnes and King at least as between themselves dissolved their business relation, although notice of dissolution was not signed until November 27, 1916. [Tr. p. 55.] Barnes would not sign any notice of dissolution because and until the bill of the Marathon Company, amounting to approximately $3900.00, (the exact amount being $3925.46) [Tr. pp. 72, 73, 94] against the King Company had been paid. This bill was paid November 27, 1916. [Claimant's Exhibit 2, Tr. p. 73.] At the time of such dissolution all obligations of the King Company had been paid except a bill of the Marathon Company of $290.00, which remained to be adjusted. The King Company claimed there were due it from the Marathon Company credits in excess of that bill. [Tr. pp. 68, 71, 73, 94, 95.] The Marathon Company's statement compiled from its books shows that the King Company was indebted to it, including said bill of $290.14, at the time of said dissolution in the

sum of $102.95 only. [Tr. pp. 24 (bottom), 91.] In October and November, 1916, and in April and May, 1917, C. M. Folger was the division manager of the Marathon Company [Tr. pp. 81, 77, 78, 83, 86], and it is fair to assume that he held that position between those dates. Mr. E. A. Somers was the representative, salesman and traveling adjuster of that company. [Tr. pp. 68, 78, 105.]

Between November 13 and 16, 1916, Mr. Barnes told Mr. Somers that he was going out of the business and that Mr. King was going to continue it on his own hook. [Tr. p. 81.] About November 15, 1916, Mr. King told Mr. Somers that he had bought (*sic*) Mr. Barnes out and was going on his own hook, at which time the bill of (order for the tires from) the Marathon Company for $885.30 was made out. [Tr. pp. 105, 106.]

Under date of November 20, 1916, Mr. Folger addressed a letter [Claimant's Exhibit 6, Tr. p. 77], to Mr. King personally, wherein he says:

"Mr. ~~Barnes~~ Somers has given me a report on the conditions as he found them, and also turned in the order which you made out on the 17th. * * * Mr. Somers advises us that you and Mr. Barnes have dissolved, but I do not anticipate any trouble in you (*sic*) a line of credit to cover your demands."

On November 27, 1916, Barnes and King entered into the consignment contract [Tr. pp. 56 *et seq.*], which is the foundation of Barnes' claim. Mr. Somers signed it as a witness. The exhibits attached to that contract were made up before the contract was signed.

[Tr. p. 78.] Each of the tires represented in them had a tag on it, on which was an arbitrary number, the name of the maker, whether Savage or other make, and the word "consigned." [Tr. p. 98.] They were at all times kept separate and apart from other tires. [Tr. pp. 69, 98, 99.] It will be noted that there is but one Exhibit "A" and "G," but two Exhibits "B," "C," "D," "E" and "F."

Barnes made a typewritten list of the different kinds of tires and afterwards wrote in on Exhibit "A" the numbers that the different tires had been tagged with so that it indicated the kind of tire, its size, the number on the tag and the price. The same was done as to all the other exhibits except Exhibit "G." No numbers were written in on any exhibit except Exhibit "A." Interlining the numbers did not work out well, so a complete list of Exhibits "B," "C," "D" and "E" with the numbers on was made out and both lists correspondingly lettered constitute Exhibit "B," Exhibit "C," etc. [Tr. pp. 68, 69.] Exhibit "G" represents the tires obtained from the Marathon Company, and for which the unadjusted bill of $290.14 was rendered. [Tr. p. 67.] They were kept in a barrel. [Tr. p. 69], separate and apart from all other makes, as the factory wanted to know if they were any good, but they were not [Tr. p. 102], and at the time of the hearing were still in stock. [Tr. p. 75.] The factory expected they would be returned. [Tr. p. 89.]

On Exhibit "A" the "10" indicates there were 10 plain tires having the size of 30x3½ (error for 2½),

the "13.40" means the cost price, the "9.40" means the price at which King was to sell each tire, and the "95.40" means the total of the ten tires. The same principle applies throughout the schedules. [Tr. pp. 70, 71.]

In the first Exhibit "B" [Tr. p. 59] the figures "24" were crossed out and "14" written above, because King found that ten of the tires were too hard, and the "144.24" was crossed out and the "84.14" written above to represent the total price of the 14 tires. Where these corrections were made in the typewritten sheet it was to conform to King's schedules. [Tr. p. 70.]

After November 13, 1916, King continued the business under the name of the George H. King Tire Company, hereinafter referred to as the King Tire Company. [Tr. pp. 71, 98.]

After the consignment agreement between Barnes and King was signed [Claimant's Exhibit 3, Tr. pp. 56 *et seq.*] King accounted to Barnes every month for sales of the preceding month of tires for Barnes' account by means of a card which showed the number on the tag of each tire sold, the name of the tire, its size, and the amount indicated in the agreement that Barnes was to receive for it. [Tr. pp. 74, 75, 76.] King paid Barnes each month by check or cash for the tires so sold. [Tr. pp. 79, 100.] He kept a separate book in which was entered all sales of the Barnes' tires. [Tr. pp. 99, 100.]

In the fore part of September, 1917, before the bankruptcy proceedings, the King Tire Company was

in the hands of the sheriff under an attachment. [Tr. pp. 38, 102, 103.] The record shows [Tr. p. 102] that this was in September, "1916," but this is unquestionably an error and should read "1917."

All the tires Mr. Barnes claims were in the storeroom of the King Company before the order for the $885.30 worth of tires was given. [Tr. pp. 106, 107.]

Correction of Errors in Appellant's Brief.

On page 7 it is stated that the statement of the exhibits on pages 4 to 8 of the record is the same as that shown on pages 58 to 67. This is not correct. The exhibits shown on pages 58 to 67 include all the tires delivered by Barnes to King in November, 1916, while the exhibits shown on pages 4 to 8 include only those thereof that remained unsold by King.

On pages 8 and 9 the contention is made that Barnes is seeking to reclaim goods purchased by the King Company from the Marathon Company that had not been paid for. Now, as we have before pointed out, there was but one bill against the King Rubber Company that had not been settled—that of the Marathon Company that remained to be adjusted. The Marathon Company before the bankruptcy claimed that the King Company owed it at most only $102.95. [Tr. p. 91.]

At the bottom of page 10 it is stated under (b): "Mr. Barnes testified that Mr. King was to pay him the price that he, Barnes, put on the tag." Mr. Barnes did not testify.

On pages 74 and 75 of the record, to which reference is made the word "tag" is not to be found.

Neither will the record at all support the construction stated by appellant's counsel. Mr. Barnes, after testifying that he requested, and that King made an accounting to him every single month on cards (one of which is printed in full on page 75 of the record), produced the cards and then proceeded to explain them. The clear construction of his testimony is that the figures on the card preceded by the dollar mark indicated that that was the amount fixed by his contract with King, that King should account for to him when the tire was sold.

Again under (d), at top of page 11, it is stated: "The findings show that Mr. King was to pay to Mr. Barnes the price stipulated on the tag only as fixed by Mr. Barnes."

The findings do not so show. The findings to which reference is made refer to the monthly settlements made by King to Barnes and are as follows:

"When such statements were made said King handed to petitioner a card whereon each tire sold during the preceding month was designated by size, make and the number which was on the tag affixed thereto and the price at which he was to account to petitioner as fixed in the exhibits attached to said Exhibit 3."

On page 12 of appellant's brief a quotation is given from Mr. Barnes' testimony from which it can be inferred that King after the dissolution conducted business under the name of the George H. King Rubber Company. The record in fact so reads, but it is

perfectly clear that either Barnes used the word "Rubber Company" when he meant "Tire Company" or that the reporter made that error. That such is error is shown by other parts of the record.

On page 14 of appellant's brief it is contended that at the time of the dissolution of the Marathon tires constituted largely the partnership assets and are claimed by the trustee herein. Reference is made to pages 64 et seq. of the record. This reference is to exhibits containing the list of the tires delivered by Barnes to King under the consignment contract. These exhibits show 193 Marathon tires and 296 of other makes. The tires actually claimed by the trustee are as shown on pages 4 to 9 of the record. Of these 36 are Marathon tires and 85 of other makes. In neither instance can it be said that the tires are "largely Marathon tires."

On page 15 of the appellant's brief reference is made to "Tires sold by the King Rubber Company." The King *Tire* Company and not the King Rubber Company sold the tires for Barnes.

In the sentence "There was nothing changed with regard to the tires," etc., on page 16 the word "tires" should be "tags."

On page 20 under 4 it is stated: "There was no provision for Mr. King to sell at prices and on terms fixed by Mr. Barnes." We contend that the prices fixed by the contract were prices below which King could not sell, and in contemplation of law were fixed prices.

In the same page under 7 it is stated: "Mr. King did business as the George H. King Rubber Com-

pany." To this should be added the words "Prior to the dissolution."

On page 22 it is stated: "All of the facts in the case at bar show that the bankrupt was permitted to mingle the goods with his other stock."

The references there made to the record do not support such statement. Mr. Barnes on page 80 and Mr. Flinn on page 103 of the record were testifying as to the condition of the tires after the attachment. What was done to mix up the tires after the attachment the record is silent. Otherwise the references show that Mr. Barnes' tires were kept separate and apart from other tires. There is, however, not a scintilla of evidence to show that Barnes *permitted* the mingling of his tires with other tires.

At the bottom of page 22 it is stated: "That the only thing that separated the tires claimed by Mr. Barnes herein from other tires was an alley-way or aisle, just so that we could get through."

This is a perverted interpretation of Mr. Flinn's testimony as it appears on pages 104 and 105 of the record. Mr. Flinn's testimony shows that Mr. Barnes' tires were piled in piles according to sizes and that between these piles just room enough was left to get a tire out, but his tires were separated from other tires by a three-foot alley-way.

ARGUMENT.

We will now discuss the points designated in appellant's brief in the order there named.

Partnership Agreement.

There was no partnership as between Barnes and King because Barnes furnished all the money and had never been reimbursed. King never had any interest in the business. As between the King Rubber Company and its creditors, we concede that Barnes was a silent partner and was liable as such. The King Company at the time of the dissolution had no creditors. There was, however, the unadjusted bill of the Marathon Company of $290.14. On adjustment of the bill the balance may be in favor of or against the King Company in a small amount only.

The testimony of Barnes that on the dissolution King was not to pay him anything is not significant. Barnes owned all of the tires he delivered to King because he paid for them, and under the terms of association in business there was nothing due Barnes from King. Hence, there was nothing to pay.

Contract of Parties.

Like appellant, we concede that upon the interpretation of this contract the rights of the parties hereto must be determined.

An analysis of this contract shows that it contains the following essential elements:

1. That said petitioner has delivered to said King said tires.
2. That each tire is suitably tagged and separately numbered.
3. That said tires are of different sizes and different makes and values.

4. That the number, value and size thereof fully appears on the exhibits attached thereto.

5. That King agrees to use his best efforts and skill to sell the tires at his place of business.

6. That King agrees to account and pay to petitioner on request the amount and price of each tire so sold as indicated and specified on said exhibits.

7. That said King should have any sum or amount in excess of the sum specified in said exhibits for each tire so sold as his commission for selling it.

8. That said King is to keep said tires separate and apart from other tires he may have for sale.

9. That said King is to keep a separate and distinct book showing the sale of all tires belonging to petitioner and which book shall be open to the inspection of petitioner at reasonable hours.

10. That petitioner is permitted to enter King's store where said tires are located at all reasonable hours to inspect and inventory them.

11. That said King is constantly to keep a night watchman in his place of business without charge to petitioner.

12. That petitioner is relieved from any guaranty of said tires except title.

13. That said tires are not to be removed without petitioner's consent.

14. That the title to said tires is to and does remain in petitioner until sold.

15. That nothing in said agreement shall be construed as a sale of said tires by petitioner to said King.

16. That no time is specified as to how long said King shall have the opportunity of selling said tires, but that he shall have a reasonable length of time, depending upon his success in selling them.

POINTS AND AUTHORITIES.

In construing an agreement the intention of the parties must prevail as gathered from the instrument itself and no parole testimony is admissible to vary its terms. (Secs. 1636, 1638, 1641, 1650, and 3268, Cal. Civil Code.) How that intention is to be arrived at is well expressed by the court in the case of Union Stock Yards & Transit Co. v. Western Land & Cattle Co., 59 Fed. 49, at pages 53 and 55, as follows:

> "The cause must therefore be determined by the construction to be placed upon the contract under which possession of the cattle was delivered to Hall. In the solution of that question we must search for the intention of the parties, as it may be gathered from a reading of the entire instrument, and not from any separate provision of it,—the real design of the contracting parties, as disclosed by the whole contract. We should not regard any mere formula of words, nor permit parties to avoid the statute by any cloaking of intent. If, as is asserted, the contract, as expressed, is a mere device to evade the law of Missouri, it undoubtedly becomes the duty of the court to tear away the mask, and declare the real nature of the transaction. The true intent and meaning of the contract does not depend upon 'any name which the parties may have given to the instrument, and not alone on any particular

provisions it contains, disconnected from all others, but on the ruling intentions of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.' * * *

"It cannot be denied that one stipulation of the contract, considered by itself, gives countenance to the suggestion of a conditional sale. We refer to the provision that Hall should be liable 'for all losses of said cattle arising from death, disease, escape, theft, or any other cause whatever.' Standing alone, this clause would be strong to show that Hall assumed the burden of the ownership. It would be most unfair, however, to judge the contract by a single clause disconnected from the other stipulations contained in it. We must have regard to the entire agreement to determine the meaning of any part of it."

Upon determining what the intention of the parties was, then, it must be determined as a matter of law whether the said agreement constitutes a sale, a conditional sale or a bailment for sale of said tires. The position of the parties to the agreement and their respective right thereunder must be determined by the law of the state of California relating to personal property.

It is appropriate at this time to note that all the cases of the Federal Courts which hold that the title to personal property under an executory agreement to sell, would upon the bankruptcy of the purchaser pass to the trustee, are based wholly upon the statutes of the state in which such cases arose, and which

statutes require that all executory contracts relating to personal property must be recorded, otherwise they are void. That rule does not prevail in California. It is established by a long line of cases that executory contracts for the sale of personal property are valid, and that no title passes until the conditions of the contract have been complied with by the vendee. It is therefore clear that the line of cases which hold such executory contracts void, being based on the law of the state making them such, can have no application to the contract in question here.

Said Agreement Did Not Constitute a Sale.

Said agreement cannot be construed to constitute a sale of the tires, because it lacks one of the essential elements of a sale, namely, an agreement on the part of King to pay the price therefor. Unless he sold them there was no obligation whatever on his part to pay a penny to petitioner.

It is the essence of a contract of sale that there should be a buyer and a seller, a price to be given and taken, an agreement to pay and an agreement to receive. A sale means at all times a contract between parties to give and to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold.

Union Stock Yards & Transit Co. v. Western Land & Cattle Company, *supra*.

The case of Cass v. Rochester, 174 Cal. 358, was an action based upon two counts. The first alleged that about October 1, 1912, defendant received from the

Metallurgique Motor Company a certain automobile under the terms of a certain contract between said defendant and said motor company, whereby defendant agreed to hold said property on consignment and *when said automobile was sold to forward to said company the sum of $1500;* that on April 22, 1913, the defendant notified said company that he would not carry out the terms of said contract; that thereafter said company sold and transferred said automobile to plaintiff; that defendant unlawfully withholds said property from plaintiff to his damage, etc. etc. The answer admits the receipt of the automobile; that defendant refused to carry out the contract unless said company would repair the automobile, which said company had refused to do. The answer also claimed that defendant had expended money upon said automobile and had a lien thereon for the amount expended. Judgment on the pleadings was given in favor of the plaintiff, which was reversed on appeal on the ground that the defendant had a lien for money expended and was entitled to hold the property until amount of his lien was paid.

It was contended on appeal that the transaction between said company and defendant constituted a sale of the automobile to the defendant for the sum of $1500. The court held that that theory could not be sustained.

Referring to the allegation of the complaint as to the contract under which the automobile was delivered, the court said:

"There is thus alleged not a contract of sale but one which made the defendant the agent of the plaintiff's assignor to sell the automobile. The word 'consignment' does not imply a sale; the very term *imports* an agency, and that the title is in the consignor. *Irrespective* of the word 'consignment,' the pleading does not show that the transaction was a sale or anything other than an intrusting of the property to the defendant as agent for the purposes of sale. The plaintiff relies upon the circumstance that defendant was *to remit a fixed sum irrespective of the amount for which he might sell the property.* This, it has often been held, is not inconsistent with the relation of principal and factor. We do not think, said the court in Harris v. Coe, *supra,* that the absence of a limitation upon the price at which goods may be sold by a consignee, who is to account to his consignor at a fixed price, will transform an agreement made in good faith and clearly intended by both parties to be one of agency, into a contract of sale. There are decisions holding that the term of the agreement may be such as to make the consignee *when the goods are sold* the purchaser and principal debtor for the goods (citing authorities), but, as indicated in the passage just quoted, even these cases concur in the view *that a sale from consignor to consignee does not in any event take place until the latter has sold the goods.* In the meanwhile the goods are the property of the consignor and the consignee is his agent." (The italics are ours.)

The Barnes-King agreement does not use the word "Consignment," but, *irrespective* of that word, as the

court said in the case last quoted from, the pleading (the contract here) "does not show that the transaction was a sale or anything other than an intrusting of the property to the defendant (King) as agent for the purpose of sale."

The remarks of the court in the Cass case relating to remitting "a fixed sum irrespective of the amount" for which the property might be sold are peculiarly pertinent to the case at bar.

In the case of *General Electric Company v. Brower*, 221 Fed. 597, the trustee in bankruptcy contended that the transaction there in controversy constituted an actual sale, if not absolute then it was conditional, and therefore void as to creditors because not recorded. The referee sustained the trustee's contention and the District Court affirmed the referee's decision. The judgment of the District Court was reversed and the cause remanded to the court below with instructions to enter a judgment for the appellant.

The contention of the appellee was that where goods are delivered by a manufacturer to a seller and the latter is allowed to place them with his stock of goods and sell and dispose of them in the ordinary course of business, to manage and control them as other goods, and where he pays all the taxes, cartage, storehouse charges and all other expenses in connection therewith, and agrees to pay for such goods so disposed of, and there is neither an agreement to return the goods nor an agreement to account for the proceeds of the sale of goods as such, there is no bailment.

The court on page 601 says:

"To ascertain the intention of that contract (the contract before the court), all of its terms should be considered in their relation one to another. The instrument is entitled 'Appointment of Agent.' It makes the Andrus Company 'agent to sell' and the agent expressly accepts the appointment. It provides that the manufacturer shall maintain a stock of lamps in the custody of the agent of the goods; that the quantity of lamps and the length of time they shall remain in stock shall be determined by the manufacturer; that all the lamps shall be and remain the property of the manufacturer until sold; that the proceeds of all lamps sold shall be held for the benefit and for the account of the manufacturer; that the agent shall return to the manufacturer at any time, if directed, any and all lamps unsold. The agent is required to sell at prices and on terms fixed by the manufacturer, and on all bills and invoices for lamps sold he is required to state that he sells as agent. The agent guarantees to the manufacturer that all lamps sold by it will be paid for. These provisions, so far as they go, all clearly and unequivocally mark the contract as a contract strictly of agency.

"We will briefly consider the provisions therein that are said to indicate a contrary intention. Those provisions are the agent's assumption of liability for loss, and for the payment of certain expenses, and for insurance. Such provisions do not change a contract of agency into a contract of sale. *Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep*

the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month less 29% for making the sales. * * *

"*In Re* Flanders, 134 Fed. 560, the court said 'the objections that ordinary invoices accompanied the shipments; that such shipments were made direct to Flanders; *that the leather was sold by him in his own name;* that he allowed credits upon sales; that he guaranteed sales and that he insured in his own name do not change the nature of the transaction.'

"*In Re* Columbus Buggy Company, 143 Fed. 859, it was held that a contract between a furnisher of goods and the receiver *that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices*, that he will bear the expense of insurance, freight, storage and handling, and that he will hold the merchandise unsold subject to the order of the furnisher, *discloses only an agreement for bailment of sale, and does not evidence a conditional sale.*"

The court, in support of its reasoning, cites John Deere Plow Company v. McDavid, 137 Fed. 802, and In Re Pierce, 157 Fed. 757 and Franklin v. Stoughton Wagon Company, 168 Fed. 857.

The court then says:

"We do not find that the appellee's contention is sustained either upon reason or authority. To constitute a sale there must have been in the *contract a vendor and a vendee and a provision for the transfer of property by the vendor to the*

vendee, and an obligation by the vendee to pay an agreed price therefor, or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale. There are no such circumstances here." (The italics are ours.)

It will be noted from the foregoing that the court in construing the contract disregards entirely the facts that the seller was allowed to place the goods with his general stock of goods; that he was to sell and dispose of them in the ordinary course of business, and that he was to manage and control them as other goods; that the contract contained no provision that the seller should keep the money from the sale of goods separate and apart from other moneys; that it contained no provision that the seller should turn over the money received from the sale to the manufacturer; that the contract contained a provision that the seller was to pay for the lamps sold each month.

The court in the Columbus Buggy Company case said that it was *unimportant that the goods may be sold at such prices as the seller chooses*, and also *unimportant that the seller will account and pay for the goods at agreed prices.*

Under the contract in the case at bar there are no terms which could be construed to constitute the petitioner a vendor or King a vendee, or an obligation on the part of King to pay an agreed price for the goods. These are *sine qua non conditions.* To constitute a sale herein a general interest in the tires must have been transferred to King. The only terms used as

to vesting any interest in King is the word "delivered." By no construction could that word be construed as one transferring any title whatever to King. It is not stated therein for what purposes Barnes delivered said tires to King, but it does contain a provision as to what King is to do in relation to said tires, that is, "to use his best efforts and skill to sell them" and to pay "when requested the price and amount of each tire so sold." King was to have a commission for selling the tires; he was required to keep them separate and apart from other tires and to keep a separate and distinct sales book showing any sales of them made by him. It is distinctly provided in the contract under consideration that nothing shall be construed as a sale by Barnes to King of said tires.

It is difficult to conceive of any language that could be used more appropriately to clearly show that it was the intention of the parties that King was to be the agent only of Barnes in selling said tires.

Said Agreement Is One of Consignment or Bailment for Sale.

In the case of *In Re* Columbus Buggy Company, 143 Fed 859, the question to be determined was did the instrument in writing evidence a conditional sale of personal property and the retention of title in the vendor until the purchase price was paid. In that case the trustee in bankruptcy took possession of certain goods which were held by the bankrupt under a contract with the Buggy Company which had not been deposited with the proper registrar of deeds. That contract provided *that the bankrupt might sell*

the goods at such price as it saw fit, and that it would pay to the Columbus Company the wholesale price less 5% discount for the goods it sold in each month by the 10th day of the succeeding month; that the bankrupt would bear certain expenses connected with the property; that the contract should continue in force for a year, and unless renewed the bankrupt would return at its expiration the unsold merchandise and that the title should remain in the Columbus Company and subject to its order until the goods were sold and paid for in cash. The Columbus Company presented its claim in reclamation to the District Court for the merchandise unsold by the bankrupt and of which the trustee had taken possession, and that court denied the petition on the ground that the contract evidenced a conditional sale and was therefore void under the statute. The ruling of the District Court was reversed by the Circuit Court of Appeals. The court said:

> "An agreed price, a vendor, a vendee, an agreement of the latter to buy and to pay for the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the restoration of the subject of an agreement is an indelible incident of a contract of bailment. (Citing cases.) This contract contains a plain stipulation that the goods are at all times subject to the order of the Columbus Company until they are sold, and that at the expiration of the term of the contract the Washburn Company will return the goods which remained unsold. It was therefore a contract of

bailment for sale and it was not subject to the statute of Oklahoma regarding conditional sales. One of the most striking and familiar illustrations of its character is given by Chief Justice Gibson in McCullough v. Porter, 4 Watts & S. 177, where he says: 'Were I to put my horse in the custody of a friend to be sold for a designated sum, with permission to retain whatever could be got beyond it, it would not be suspected that I had ceased to own him in the meantime, or that my friend would not be bound to return him even without a stipulation, should he have failed to obtain the prescribed price.' A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, and will account and pay for the goods sold at agreed prices; that he will bear the expenses of insurance, freight, storage and handling, and that he will hold the unsold merchandise subject to the order of the purchaser, discloses a bailment for sale and does not evidence a conditional sale. *It contains no agreement of the receiver to pay any agreed price for the goods. * * * The fact that such a contract provides that the receiver of the goods may fix the selling price and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and sales does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the purchaser to transfer the title to him for that price."* (Citing Sturm v. Boker, 150 U. S. 312, and numerous other cases.)

In the case of *In Re* Galt, 120 Fed. 64, the court on page 67 says:

"The questions suggested by the record are: (1) Whether the contract is one of bailment or of conditional sale. (2) Whether if the latter, a trustee in bankruptcy of the vendee in such sale may retain the property as against the vendor and in right of general creditors, the law of the state holding conditional sales void as to *bona fide* purchasers and attaching or execution creditors.

"The law of the state of Illinois with respect to conditional sale as expounded by its Supreme Court * * * has become a rule of property in that state and we are bound to observe it. Harkness v. Russell, 118 U. S. 663. * * *

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered is to be restored. *In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered and there is no obligation to return it.* Sturm v. Boker, 150 U. S. 312. * * *

"The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor *may require the restoration of the thing bailed,* and in a sale, whether absolute or conditional, *there must be an agreement express or implied to pay the purchase price of the thing.* The test would seem to be, has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money."

In the foregoing case the court held that the contract there considered constituted a *del credere* commission and not a sale, that the sender could compel a return of the goods not sold, that Galt had no option to pay for them in money and that nowhere in the agreement did Galt covenant to pay for the goods as in the case of a sale. The court also in discussing the clause in the contract giving an option to the sender to require Galt to give his note, to pay cash or to restore subject to the sender's order the goods not sold within 12 months says:

> "That it is probably the strongest clause in the contract to indicate a sale, but, as suggested by the Supreme Court of Illinois in Lenz v. Harrison, while it might have such force considered alone, taking it with the whole contract it was seemingly incorporated to compel the agent promptly to sell and report sales within the time stated."

The court held the contract there considered to constitute a bailment and not a sale.

What the courts of California have decided to be the law concerning contracts of this nature should be given great, if not controlling, weight in the case at bar.

The case of Vermont Marble Company v. Brow, 109 Cal. 236, was one brought by the plaintiff against a constable for the value of certain marble monuments sold by him under writs of execution issued against the property of one Plymire upon judgments in favor of Plymire's creditors. The question in-

volved was whether the marble when levied upon and sold was the property of plaintiff or of Plymire. Plymire had a marble shop and dealt in funerary stones and monuments; he had been accustomed to purchase unfinished monuments from plaintiff and had become indebted to it for marble previously purchased. Plymire agreed in writing with the plaintiff that in consideration of sending him certain specified monuments on consignment he would hold the same as the property of the company until sold and subject to its order, and as fast as he sold the monuments he would remit the money, the cost price at which each was listed to him, and when he took notes in lieu of cash he would remit the notes. Afterwards Plymire agreed with plaintiff for a further consignment of goods specifically described, and agreed to keep an account of the sales of the monuments described in a book and send it to the plaintiff on the first of each month, and *as fast as said work was sold and erected pay to plaintiff the list or cost price to him of each piece of marble sold by him,* either by cash or customer's note; that he held the marble sold on consignment to be paid for when sold and that it remained the property of the plaintiff until paid for, and at all times subject to its order. Plymire, it was further understood, would take orders for and *sell the marble in his own name; he had the right to fix the selling price and terms of sale;* he was to bear the cost of transporting the marble from San Francisco to Marysville, his place of business. The court on pages 240 and 241 says:

"Mere transfer of possession without agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale or have the effect to transfer the title. (Borland v. Nevada Bank, 99 Cal. 94, 37 Am. St. Rep. 32.) We consider that the true nature of the transaction was that of a sale upon *condition—the condition being, as to each monument, that Plymire should sell the same to some third person; until then he was under no obligation to pay plaintiff the cost price, and until then he was compellable to surrender the goods to plaintiff upon demand.* When he sold a monument he was precisely within the case put by Mellish, L. J., in *Ex Parte* White, 6 L. R. Ch. App. 397, 405: 'If A hands over his goods to B, and B is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B then sells to C, the natural inference from these facts is, beyond all doubt, that there is a sale made to B, and another sale from B to C.' But obviously there is no completed sale to B until he sells to C; this is illustrated in Nutter v. Wheeler, 2 Low. Dec. (U. S. Dist. Ct.) 346; there W. & Company were in the habit of sending their manufactured goods to one Gear in Boston, and *Gear sold them at such prices and on such terms as he pleased, not less than the trade prices fixed by W. & Co.; whenever he made a sale he was to pay W. & Co. in thirty days the prices shown in their list to him, less an agreed discount;* after a sale was made by him his credit only was looked to by W. & Co.; Gear became bankrupt, and W. & Co. took back the goods of their manufacture in his shop unsold. The court

said: 'Until a sale was made the property in the goods remained in the defendants (W. & Co.), and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear.' So, in our opinion, at the time of the levy and sale by defendant here the monuments were the property of plaintiff and not liable to execution for Plymire's debts.

"As suggested by appellant, there may be impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties, but this consideration is for the Legislature and not the courts; the common-law right of the seller by appropriate contract to retain the title until the performance of some valid condition on the part of the buyer has been long recognized in this state, as almost universally elsewhere. Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. McGovern, 65 Cal. 244; Benjamin on Sales, Bennetts' (6th Ed.), 255, 282, *et seq.* That the property is to be resold by the first (conditional) purchaser does not affect the rule. (Hirsch v. Steele, 10 Utah 18, and cases cited.)"

Applying the well-established rule of construction to the agreement here, we can find no other intention expressed therein than that appellee consigned the tires to Mr. King for sale for the former's account.

Upon examination of said agreement we first come to the word "delivered." That word does not even cast a shadow of an intention to transfer any title in the tires to King. On the other hand, when taken in connection with King's agreement to use his best efforts and skill to sell said tires and to account and

pay to petitioner the price and amount of each tire sold, and to have any sum or amount in excess of the sum specified for his commission, it seems perfectly clear that the word "delivered" means that said tires were intrusted to King simply for the purpose of sale.

The next provision of the agreement we come to is King's agreement to use his best efforts and skill to sell the tires. This agreement is exactly what would be required of any person to whom goods are consigned for sale—in other words, of an agent.

The next provision provides for a commission to be paid King for his services in selling the tires. This provision not only negatives any intention to transfer any title to King, but also clearly indicates an employment.

The next clause requires King to keep the tires separate and apart and to keep a separate and distinct sales book open to the inspection of Barnes. This clearly indicates that both parties conceded that the tires belonged to Barnes and that it was their desire, or at least the desire of Barnes, to preserve the identity of the goods and his ownership therein. If a sale had been intended what interest would Mr. Barnes have as to where or how the goods should be kept, or what interest would he have in requiring King to keep a separate sales book?

The next provision provides that Barnes may enter the store building where the tires are located and inspect and inventory them. This shows that the intention was that the tires should still belong to Barnes,

otherwise what interest would he have in entering the building to inspect and inventory them?

The next provision requires King to keep a night-watchman in the place. If the tires did not belong to Barnes what interest would he have in requiring a nightwatchman to be kept? This was to protect Barnes against destruction or loss of the tires by either fire or theft, which would not have been necessary if it had been the intention to transfer title to King.

The next provision forbids Mr. King to remove the tires without Mr. Barnes' consent. This clause shows that Mr. Barnes had control of the tires.

Then comes the clause which provides that the title to the tires shall remain in Barnes until the same are sold and nothing shall be construed as a sale by Barnes to King. In our opinion this clause is entirely unnecessary, because there are no provisions of the contract which could possibly be construed to evidence a sale of the tires. It adds emphasis, however, to the dominant idea expressed throughout the agreement that the intention of the parties was to create an agency only.

The last provision relates to the time King shall be given to sell the tires. Certainly nothing in that clause can be construed as transferring any title to King, but it reserves to Barnes the right at any time, if in his opinion Mr. King was not making sufficient sales, to take the tires from his possession. Thus it is seen that the contract in question in almost every clause and expression negatives the idea of a sale,

or transfer of title, but emphasizes the dominant idea of a consignment of the goods for sale.

The agreement contains no words which would indicate a vendor or vendee, nor any agreement on the part of Barnes to sell or King to buy and pay therefor a fixed price. A sale means a complete transfer of a general interest in the thing sold and an obligation on the part of the purchaser to pay a fixed price; and there must be a price fixed which the seller can demand and enforce in a court of law. Nothing of that kind appears here.

All Debts Were Paid.

Opposing counsel contend that all the debts of the King Company were not paid and base their contention wholly upon the deposition of Mr. Sarchet and on a single clause of the testimony of Mr. Barnes.

Mr. Sarchet was testifying in reference to Claimant's Exhibit No. 13 [Tr. pp. 88 *et seq.*], which is a letter from Mr. Folger, division manager of the Marathon Company, to the King Tire Company, dated May 7, 1917, enclosing a statement from the factory showing the condition there of the account of the King Tire Company. This statement was sent particularly for Mr. Barnes' information. On April 19, 1917, Mr. Barnes requested Mr. Folger to obtain such statement so that he could harmonize his accounts with those of the Marathon Company. [Tr. pp. 88 *et seq.*] Now, Mr. Sarchet's statement that there was due the Marathon Company $988.25 is not justified or borne out by said Exhibit No. 13. The amount

then due the Marathon Company from the King Company as shown by the statement [Tr. pp. 90, 91] was as stated in the letter $98.35, and a statement that it was $988.25 shows either gross ignorance or a wilful misstatement. The $4.60 balance as of April 11, 1916, was shown because there was a slight difference between the accounts of the Marathon Company and those of the King Company. That amount was not due the Marathon Company and is fully explained by Mr. Barnes. [Tr. p. 96.] Mr. Sarchet evidently tries to include the invoice of Nov. 20, 1916, amounting to $885.30, which by error was at first charged to the King Company but later corrected and charged to the King Tire Company. [Tr. pp. 91, 85.] Mr. Folger knew that this bill of goods should not have been charged to the King Company, but to Mr. King or the King Tire Company only. [Tr. p. 77.] See also Tr. pp. 105, 106, 107. Mr. Folger on April 19, 1917, long after the dissolution and six months before the bankruptcy proceeding, over his own signature, stated that the Marathon Company had no claim whatever against Mr. Barnes. [Tr. p. 86.] Moreover, the Marathon Company has never made any demand upon Mr. Barnes for settlement and he is in financial shape to pay that company or anybody else what he owes. [Tr. p. 97.]

The statement in Mr. Barnes' testimony on which counsel rely is as follows: "It was not a payment of all indebtedness due at that time." This is followed by the statement: "There was nothing else due the Marathon people." He was there testifying as to the

bill of $3900 and when he said it was not a payment of all indebtedness due at that time he unquestionably had reference to the unadjusted account of $290.14. [Tr. pp. 73, 76.]

The Case of Miller Rubber Company v. Citizens Trust & Savings Bank Has No Application to the Case at Bar.

Counsel for appellant compare the terms of the agreement in the Miller case with the terms of the agreement under consideration here, and contend that many of the provisions of the contract in that case more strongly tend to establish the relation of principal and agent than those of the Barnes-King agreement.

We concede that some of the provisions of the contract in that case taken by themselves tend to establish an agency only, but there are other provisions which tend to establish a sale. Upon these last mentioned provisions the court based its decision, as we will hereinafter point out. There are no provisions in the Barnes-King contract, however, that could in any way be construed as indicating a sale of, or any intention to vest title to the tires in King. If so, then the principles upon which the decision in the Miller case is based are entirely wanting here.

We have carefully considered the Miller case but fail to see how it can be construed to support opposing counsels' contentions. It does, however, support appellee's position.

The court in that case at page 491 says that as "between the parties to the contract" it is a consign-

ment of goods for sale upon the terms and conditions therein stated, and then points out the various terms of the contract that would clearly establish the relation of principal and agent. What bearing the phrase as "between the parties to the contract" has upon the court's decision we are unable to determine. If we construe a contract as between the parties to it as establishing the relation of principal and agent, we are unable to understand how it can be construed otherwise, even when the claims of third parties have to be considered. *The decision there is based wholly upon those provisions of the contract that indicate a sale of the goods.*

The court there cites (page 499) with approval an excerpt from the opinion in General Electric Company v. Brower, 221 Fed. 579, and lays down three incontrovertible elements that must be in the contract to constitute a sale, viz: (1) There must be a vendor and a vendee; (2) A provision for the transfer of property from the vendor to the vendee, and (3) an obligation by the vendee to pay an agreed price therefor.

None of these three elements appear in the Barnes-King contract.

The court italicizes the following language from such excerpt:

> "Or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale."

The court then goes on to say that the same thing was in effect held by the Supreme Court in the case of Ludvigh v. American Woolen Company, 231 U. S. 522, but there were in neither of those cases such fraudulent circumstances, and continues:

> "But we do not think that that can be affirmed in the present case, for here not only was the agent permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignors would furnish the consignee, free of charge, all samples of tires and accessories and necessary advertising matter imprinted with the name and address of the consignee. It is difficult to see how the consignors could have more effectually held the consignee out to its customers as the real owner of the consigned property. To permit them to re-take from the stock of the bankrupt the remaining portion of the consigned goods would, in our opinion, operate as a fraud on the creditors of the bankrupt."

Upon the language just quoted the court bases its decision, and none of the elements there stated appear in the case at bar. Not only was King not permitted to mingle the Barnes goods with his own stock, but it was expressly provided in the contract that he should "keep said tires separate and apart from other tires which he may have for sale." It is needless to say that the Barnes-King contract contains nothing relating to furnishing free of charge samples, accessories and advertising matter imprinted with King's name and address. The language of the decision "to permit them to re-take from the stock of the bankrupt

the remaining portion of the consigned goods would in our opinion operate as a fraud on the creditors of the bankrupt," shows that the court's decision was based upon the matters previously stated. It then goes on to say that it finds

> "Confirmation of this view in the failure of the consignors to fix by the contract the prices at which the agent could sell the goods to its customers, and in their failure to therein make any provision for the remitting to the consignors of the proceeds received by it for the goods sold; the agent being required by the contract to itself pay to the consignors for the goods so sold by it prices fixed in the invoices, less the deductions specified, and in the provision that when the agent 'desired four months notes drawing interest at five per cent will be accepted by first party in settlement for all *purchases* made by second party from first parties. Provided, however, that the total maximum of such notes shall not exceed $25,000 at any one time during the first year of this contract, and that such maximum after the first year is to be subject to the mutual agreement of both parties, but not less than $25,000 unless *credit of second party becomes impaired.*' For the reasons stated we think the court below was right in confirming the conclusion of the special master, that as to the creditors of the bankrupt, the title to the consigned goods in question should be held to have passed to the consignee."

The court does not say that the failure to fix the sales prices, or the failure to make any provisions for remitting the proceeds derived from the sales to the

consignors, or the agent being required by the contract to itself pay to the consignors for the goods sold by it prices fixed in the invoice, would make the agreement one of sale.

As we have seen by the authorities cited, neither one or all of these elements will change a consignment agreement to one of sale.

There was one element, however, in the Miller contract which undoubtedly went far to control the opinion, and that is: That whenever the agent desired, four months' notes drawing interest would be accepted by first parties in settlement for all *purchases* made by second party up to a total of $25,000. From that provision it is clear that the agent could settle for all *purchases* made by it up to the value of $25,000 and thus become owner of the goods of that value.

The Miller decision is good law when applied to similar facts, but it has no bearing whatever upon the case at bar. That such is the case is concretely shown by stating the points which control the decision of the court, viz:

(1) The agent was permitted to mingle the consigned goods with his own stock.

The Barnes-King contract forbids such comingling.

(2) The contract expressly provided that the consignors would furnish the consignee "free of charge all samples of tires and accessories and necessary advertising matter imprinted with the name and address of the consignee."

There is no such provision in the Barnes-King contract.

(3) Failure of the consignors to fix by the contract the prices at which the agent could sell the goods to its customs.

This provision will not *change* a consignment agreement into one of sale.

Cass v. Rochester, 174 Cal. 358;

In Re Columbus Buggy Co., 143 Fed. 859;

Vermont Marble Company v. Brow, 109 Cal. 236.

(4) Consignor's failure to make any provision for the remitting to them of the proceeds derived by the consignee for the goods sold.

Such contract will not make the contract one of sale.

Cass v. Rochester, *supra;*

General Electric Company v. Brower, 221 Fed. 597;

In Re Columbus Buggy Company, *supra.*

(5) Agent being required by the contract to itself pay to the consignors for the goods so sold by it prices fixed in the invoice.

This provision is not inconsistent with a consignment agreement.

Cass v. Rochester, *supra;*

General Electric Co. v. Brower, *supra;*

In Re Columbus Buggy Co., 143 Fed. 859.

(6) The privilege of the consignee to give notes drawing interest for purchases made.

There is no such provision as this in the Barnes-King contract.

Opposing counsel invite the court's most careful consideration to the comparison of the contract in the

Miller case with the one at bar, and draw attention to paragraphs in each contract relating to the same matter to show that the Miller contract more strongly, as to the paragraphs cited, establish the relation of principal and agent than the Barnes-King contract. This we cannot concede.

They say that the Barnes-King contract requires Mr. King to pay the price and amount of each tire so sold as indicated and specified on the exhibits. The clear meaning of this provision is that the price was to be paid for each tire only when *"so sold,"* that is, after it had been sold; and this is further emphasized by the fact that King was to have any sum in excess of the price fixed for which said tire was *sold* as his commission. No commission was due until the tire was sold.

Even If the Debts of the King Company Had Not Been Paid Appellee Had the Right to Take the Tires.

Opposing counsel contend that Mr. Barnes is attempting to take part of the stock of the partnership in partial settlement of partnership affairs. As between Barnes and King they were not partners; the time never arrived when King participated in the profits. Mr. Barnes never took any stock of the partnership because the partnership never owned any stock; neither did he take anything in partial settlement of partnership affairs, because there were no partnership affairs to settle. If any money were made in the business it went to repay Mr. Barnes for money

he had advanced, if money were lost he lost it. King was never indebted to Barnes in the so-called partnership transaction. That partnership was dissolved, for all purposes of this case, on November 14, 1916. Mr. King has alone been adjudged a bankrupt. Whatever assets there were of the King Company belonged to Mr. Barnes and were taken over by him, and to him alone the creditors of that company must look for settlement of their accounts. This court has no jurisdiction over the assets of that company.

Subdivision "h," section 5, Bankruptcy Act;
Williams v. Lane, 158 Cal. 39.

Even the insolvency of a partnership will not affect the right of a partner in good faith and for a valuable consideration to sell and transfer his interest in the firm to a co-partner.

Re Fackelman, 41 A. B. R. 14.

Now, the King Company was not insolvent, neither did King transfer any interest in the assets of the company to Mr. Barnes. Such assets belonged to Mr. Barnes and he had a right to take them, as the transaction, if it may be called such, was in good faith, without fraud, and necessarily for a valuable consideration. As held in the Fackelman case, the only remedy of the creditors of the King Company is to proceed in some form of action against Mr. Barnes as an individual. The Marathon Company had, when it was notified in November, 1916, of the dissolution of the partnership, a clear, speedy and adequate remedy, if not by adjustment, which Mr.

Barnes was always willing to make, it did have by an action at law and should have taken that course had it desired to do so. The equitable claims are now too late to be enforced and should not be here considered, for equity aids the vigilant and not the sleeping.

It thus appears clear to us that the trustee's so-called "Third Defense" is no defense at all; and any and all evidence introduced in connection therewith and the defense itself should be disregarded.

This brings us to the question—do the tires in question belong to Mr. Barnes and should the order of the referee and the District Court be affirmed? If not, it is clear that property belonging to the King Company will be subjected to the payment of the debts of George H. King, doing business as the George H. King Tire Company. This, of course, can not be done.

We quote from *In Re* American Candy Manufacturing Company, 41 American A. B. R. 461, as the same appears on page 465, as follows:

> "It is well settled that the trustee as such, and the creditors through him, obtain no greater rights against those having a title or liens enforcible in bankruptcy than the bankrupt would have had in their place. In other words, they stand in the shoes of the bankrupt except insofar as the trustee is given the rights of a judgment creditor as of the date of filing the petition (Sec. 67f) and insofar as the bankruptcy wipes out their liens. Hence, property to which title has not actually passed or vested in the bankrupt

can not be added to the bankrupt estate either by the trustee or the creditors any more than a sheriff by levying execution upon the bankrupt's property could take that of a third party which happened to be in the bankrupt's possession."

Oral Testimony Cannot Vary the Terms of a Written Contract.

Counsel for appellant lay stress on the testimony of Mr. Barnes that King could sell the tires for any price. This testimony can not be considered. In support of our contention we quote from Harding v. Robinson, 175 Cal. 534, as same appears on page (6):

"Section 1625 of the Civil Code, and section 1856 of the Code of Civil Procedure, do more than declare rules of evidence. They lay down positive, substantive law. 'Those sections declare a rule of law so long and so well established that it is needless to cite further authorities in its support.' (Pierce v. Edwards, 150 Cal. 650.) 'According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law.' (Pitcairn v. Philip Hiss Co., 125 Fed. 110; 1 Greenl. Ev., 16th Ed., 350a.) By that law the solemn obligations of parties evidenced by their writings may not be modified or set aside for fraud unless the rules of this substantive law in pleading the fraud are duly complied with. Furthermore, when they have not been so complied with, not only is evidence inadmissible to effect such a modification of the contract, but if it be admitted, and that without objection of the opposing party, nevertheless, it

is the duty of the court to disregard it utterly in reaching its decision. (Citing several cases.) As said by the Supreme Court of Alabama, this evidence 'is against law; the silence of the opposing party does not cure its illegality, and the court is bound, *mero motu*, to treat it as having no validity.' And, as says the Court of Appeals of New York: 'It does not follow that the omission to object to testimony is a concession that it is competent.'"

Conclusion.

We, therefore, respectfully contend that there is ample evidence to support the findings of the referee that the conclusions of law drawn therefrom have been correctly drawn and that the order of the referee based thereon and the order of the District Court affirming the referee's order should be affirmed by this Honorable Court.

Respectfully submitted,

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